LOS ANGELES TIMES

June 3, 1938.

Dr. J. L. Pomeroy,
Health Officer,
Los Angeles, California.

Dear Doctor Pomeroy:

This will acknowledge receipt of your letter taking exception to the remarks of Doctor Brady in his column of April 28, 1938.

As you know, Doctor Brady's column is a syndicated feature and the opinions expressed therein are Doctor Brady's and not necessarily those of the *Times*.

I shall be glad to forward your letter to Doctor Brady.

Very truly yours,
THE LOS ANGELES TIMES.
L. D. Hotchkiss, *Managing Editor.*

MEDICAL JURISPRUDENCE †

By HARTLEY F. PEART, ESQ.
San Francisco

Malpractice: Proof of Negligence of a Physician and Surgeon by Testimony Other Than Expert Testimony

The general rule with respect to proof of negligence against a physician and surgeon is that the acts and conduct which may constitute negligence on the part of a physician or surgeon in the performance of a professional service are matters so peculiarly within the knowledge of physicians and surgeons and so far beyond the knowledge of the average man that proof of negligent acts and conduct can only be made by physicians and surgeons. Such testimony of physicians and surgeons is called expert testimony and the evidence which they adduce concerning the propriety of the defendant's acts and conduct is called "opinion evidence."

In rare instances courts have held, under the facts of a particular case, that the act or omission of a physician and surgeon or other professional person was so obviously negligent that the matter could reasonably be said to be within the knowledge of the average man and that as a consequence expert testimony was not necessary. A recent California case relies upon this exception to the general rule requiring proof of negligence against a physician and surgeon to be by means of expert testimony only. In *Thomsen* vs. *Burgeson,* 93 Cal. App. Dec. 394, decided May 4, 1938, the alleged facts were as follows:

Defendant performed a tonsillectomy upon plaintiff who, at the time, was two years and eight months of age and removed the uvula and a portion of the soft palate and injured the anterior and posterior pillars of the plaintiff's throat. Plaintiff's complaint alleged negligence in the removal of the uvula and a portion of the soft palate and in the injury to the anterior and posterior pillars of the throat, and, in addition, alleged that a trespass had been committed in that defendant "without the consent of plaintiff or his parents, removed said uvula and portion of the soft palate."

At the trial the plaintiff did not produce any expert testimony in support of the allegations of his complaint. Defendant thereupon contended that there was nothing to go before the jury, because, in the absence of expert testimony concerning the propriety of the defendant's act, the jury had no standard by which it could judge defendant's conduct.

The Court, however, held as follows:

Without going into further detail, it is sufficient to state that the evidence reveals a situation which clearly takes the case at bar out of that class of cases in connection with which expert testimony is indispensable. . . . The rule has been declared as follows: "It is equally true that cases which depend upon knowledge of the scientific effects of medicine, or the result of surgery, must ordinarily be established by expert testimony of physicians and surgeons. This rule, however, applies only to such facts as are peculiarly within the knowledge of such professional experts and not to facts which may be ascertained by the ordinary use of the senses of a nonexpert." So far as an understanding of the operation involved herein is concerned, it would appear to be a matter of common knowledge that the removal of a portion of the soft palate and of the uvula is no part of a tonsillectomy. The location of the tonsils is a matter which is easily observable to anyone, and the location and functions of the uvula and soft palate are matters of common knowledge, and of which the courts can take judicial notice. Therefore, there was evidence in the record, at the time the motion for a directed verdict was granted, sufficient to support a verdict for plaintiff had such verdict been returned.

There can be no quarrel with the rule of law which allows an exception to the general rule requiring proof of negligence against a physician and surgeon to be by means of expert testimony and by no other, in those instances where the alleged negligent act or omission is obviously negligent or may clearly be said to be of a wilful nature. Examples of cases in which expert testimony has been said to be unnecessary are: Where a dentist leaves a decayed tooth in the jaw of his patient and removes one which is sound and serviceable, and where a surgeon undertakes to stitch a wound on the patient's scalp and while doing so thrusts his needle into the patient's eye.

However, conceding the rule to be a sound one, the question arises, should it have been applied under the facts of the case under discussion? It may well be disputed that the alleged acts of the defendant in *Thomsen* vs. *Burgeson* were such that it could be said to be "a matter of common knowledge" that they would not have occurred if due care had been used. Is it true that "the location of the tonsils is a matter which is easily observable to anyone"? It would seem to be fairly clear that the tonsils cannot be located "easily" by anyone. It would also seem to be clear that the "location and functions of the uvula and soft palate" are not matters of common knowledge. Therefore, it is believed that the District Court of Appeal erred in applying to the facts before it the rule dispensing with the requirement of expert testimony. After all, if the alleged negligence was as clear-cut as the Court believed, there would be no difficulty in proving that fact.

† Editor's Note.—This department of CALIFORNIA AND WESTERN MEDICINE, presenting copy submitted by Hartley F. Peart, Esq., will contain excerpts from and syllabi of recent decisions and analyses of legal points and procedures of interest to the profession.

SPECIAL ARTICLES

CALIFORNIA MEDICAL ASSOCIATION

Sixty-Seventh Annual Session, Pasadena* May 9–12, 1938

California Medical Association Opens Four-Day Session

Speakers Tell Change in Public Attitude

Maintaining that "the one outstanding achievement of the twentieth century, so far as medicine is concerned, is the change in attitude toward venereal diseases on the part of the laity and the medical profession," Dr. Morrow of San Francisco, President of the California Medical Association, opened the organization's sixty-seventh annual convention here today.

Expect Two Thousand Delegates

Eight hundred delegates were registered this afternoon, the number being swelled rapidly as newcomers arrived at the Hotel Huntington, convention headquarters. It is expected that two thousand will be in attendance by the time the conclave ends on Thursday.

Dr. George H. Kress, President of the Los Angeles County Medical Association, gave a short address of welcome to the delegates, and Dr. F. C. Warnshuis, Secretary of the State Association, announced convention highlights.

The president's dinner is scheduled to take place tomorrow night at the Hotel Huntington, and President-Elect Dr. William W. Roblee of Riverside will take office on Wednesday.

Scientific section meetings were held this afternoon, with more such sessions scattered throughout the convention.

The entire patio of the hotel has been turned into a regular "circus" tent, with more than fifty elaborate exhibits being kept open day and night.

Doctor Morrow's address, a review of the medical world's stand in the fight against venereal diseases, was the feature of the morning session. . . . —Pasadena *Star-News,* May 9.

* Paragraphs here printed have been taken from press reports.